

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LOIS SANDER)	
Claimant)	
VS.)	
)	Docket No. 258,914
STATE OF KANSAS)	
Respondent)	
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Fund)	

ORDER

Respondent and its insurance fund appealed the October 15, 2007, Post Award Medical Order entered by Administrative Law Judge John D. Clark. The Board placed this appeal on its summary docket for disposition without oral argument.

APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared for claimant before the Administrative Law Judge. But Mr. Riedmiller has neither filed a brief with this Board nor otherwise appeared in this appeal. Richard L. Friedeman of Great Bend, Kansas, appeared for respondent and its insurance fund.

RECORD

The record in this post-award request includes the transcript from the July 12, 2007, hearing held by Judge Clark; the transcript of claimant's deposition, which was taken on July 18, 2007; the March 11, 2005, Nunc Pro Tunc Award entered by Judge Clark; and the Division of Workers Compensation administrative file.

ISSUES

This is a claim for an August 16, 1999, accident that claimant sustained while working for respondent. In a March 11, 2005, Nunc Pro Tunc Award, Judge Clark found claimant sustained a 15 percent functional impairment to her right leg and a five percent functional impairment to her low back as a result of that accident. The Judge awarded

claimant permanent partial disability benefits under K.S.A. 1999 Supp. 44-510e for an 11 percent whole person functional impairment. The Judge also stated in the March 11, 2005, Nunc Pro Tunc Award that future medical benefits would be considered upon proper application to the Director of the Division of Workers Compensation.

Claimant initiated this post-award proceeding to request additional medical benefits and to request that Dr. Frederick Smith be named her authorized physician. In the October 15, 2007, Post Award Medical Order, Judge Clark authorized Dr. Smith to examine claimant and determine if claimant's present complaints are related to her August 16, 1999, accident. Moreover, the Judge named Dr. Smith as the treating physician upon the condition the doctor found claimant's present complaints were related to her accident at work. The October 15, 2007, Post Award Medical Order reads in pertinent part:

A post award hearing for additional medical treatment was held on July, [sic] 12, 2007. The testimony of the Claimant was taken on July 18, 2007. No further evidence has been presented by either party.

After reviewing the testimony of the Claimant, this Court authorize[s] Dr. Fred[e]rick Smith to examine the Claimant to determine if her present problems are related to her work injury. If they are related, Dr. Smith is authorized as the Claimant's treating physician.

Respondent and its insurance fund contend claimant has failed to prove she is entitled to any additional medical attention. They argue claimant has a "severe veracity problem"¹ and that she did not present any medical evidence to support her request for additional medical treatment. In addition, they contend the Judge has delegated his responsibilities under K.S.A. 44-510k to Dr. Smith to determine whether claimant is entitled to additional medical care. Respondent and its insurance fund summarized their arguments, as follows:

Claimant's veracity problems indicate that [claimant's] testimony will not support a claim for Post Award Medical in the absence of any medical evidence. Further, interesting legal issues are presented, which suggest that the Administrative Law Judge has improperly delegated his authority to a doctor, inviting that doctor to invade the province of the Administrative Law Judge, and denying the respondent the ability to cross-examine that doctor and have that considered by the Administrative Law Judge. Respondent is now forced to plead its case to the doctor, rather than to the judge. This is inappropriate.²

¹ Respondent's Brief at 4 (filed Nov. 5, 2007).

² *Id.* at 6.

Although the brief respondent and its insurance fund filed with this Board does not state what relief they are requesting, in their Application for Review they have requested the Board to address the following issues:

1. Whether this Claimant is entitled to post award medical treatment.
2. Whether this Claimant is entitled to post award medical treatment in light of her veracity challenges, (see Award), in the absence of medical evidence.
3. Whether the Administrative Law Judge may delegate his decision making authority to the doctor.
4. Whether the Administrative Law Judge may deny Respondent an opportunity to present evidence by adopting the as yet undocumented opinions of Claimant's chosen doctor.
5. All other issues which may properly be presented to the Board.³

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering respondent and its insurance fund's arguments, the Board finds and concludes:

As indicated above, this claim pertains to an August 16, 1999, accident. In the March 11, 2005, Nunc Pro Tunc Award it was determined claimant permanently injured her low back and right leg while working for respondent. She now requests additional medical treatment for those injuries.

Claimant's testimony comprises the only evidence presented in this post-award request for additional medical benefits. At her July 18, 2007, deposition, claimant testified her lower back and right knee symptoms had worsened over the last year and, therefore, she was seeking (1) replacement of prescription insoles, (2) additional right knee injections, if the doctor approved; and (3) a doctor to evaluate her low back. In addition to describing how she was experiencing increased swelling and "cracking"⁴ noise in her right leg and increased pain in her low back, claimant testified in part:

Q. (Mr. Riedmiller) Can you describe to the Court how your condition is getting worse in your lower back?

³ Application for Review to the Workers Compensation Board at 1, 2.

⁴ Sander Depo. (July 18, 2007) at 11.

A. (Claimant) Well, sometimes when I try to bend over -- when I'm trying to do something it really hurts really bad, like pick up my cat food dish and put a water dish down and stuff like that, it really bothers. And sometimes it's a shooting pain, and it's just in my lower back.

Q. And it shoots from your lower back down to where?

A. It shoots from down here down, (indicating) down to my spine thing.

Q. For the record, you're motioning with your left hand to the middle of your back; is that right?

A. Yeah. It shoots.⁵

Claimant further testified that she has not received any medical treatment for her low back or right leg since late 2004 as she did not want her private health insurance to have to pay for it.

As indicated above, Judge Clark authorized Dr. Frederick Smith to examine claimant and formulate an opinion of whether claimant's present symptoms are related to her August 16, 1999, accident. The Board concludes that portion of the October 15, 2007, Post Award Medical Order is appropriate as K.S.A. 44-516 vests the administrative law judges with the authority to request evaluations by physicians in order to help resolve disputes.

The Board, however, concludes it was not appropriate for the Judge to designate Dr. Smith the authorized physician upon the condition the *doctor* determined claimant's present problems are related to her August 1999 accident. In essence, the Judge delegated his authority to the doctor to determine the ultimate question of fact in this post-award proceeding. The statute governing post-award medical benefits, K.S.A. 2006 Supp. 44-510k, provides in part:

(a) At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. *The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award.* No post-award benefits shall be ordered without giving all parties to the

⁵ *Id.* at 6, 7.

award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto. (Emphasis added.)

Whether or not an injury or condition either resulted from an accident at work or developed as a natural consequence of the initial injuries sustained in such accident are questions of fact to be determined by the judge. The Board is unaware of any provision in the Workers Compensation Act that permits a judge to delegate that determination to anyone else. Accordingly, the Board must set aside the provision of the October 15, 2007, Post Award Medical Order in which Dr. Smith is appointed claimant's treating physician upon his determination that claimant's present complaints are related to her earlier work injury. The doctor may have an opinion, but the Judge should ultimately decide that issue.

At this juncture, the remaining issues raised by respondent and its insurance fund are premature.

WHEREFORE, the Board modifies the October 15, 2007, Post Award Medical Order and, for the reasons above, sets aside that portion of the Order in which Dr. Smith becomes claimant's treating physician upon his determination of whether claimant's present symptoms are related to her earlier work injury.

IT IS SO ORDERED.

Dated this ____ day of January, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent and its Insurance Fund
John D. Clark, Administrative Law Judge